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IN THE

Supreme Court of the United States

JESUS C. HERNANDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* FORMER OFFICIALS OF U.S. CUSTOMS AND BORDER PROTECTION AGENCY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are former high-level officials of the U.S. Customs and Border Protection (CBP) Office of Internal Affairs. CBP is a subagency of the Department of Homeland Security that oversees the law enforcement organizations that control our nation's ports of entries and borders, including the U.S. Border Patrol. The Office of Internal Affairs (OIA) is responsible for preventing, detecting, and investigating instances of misconduct, corruption, and use of excessive force by CBP agents and officers. *Amici* respectfully submit this brief to provide the Court with information about CBP and the Border Patrol relevant to the questions presented here.

Amicus James F. Tomsheck served as the Assistant Commissioner of the CBP Office of Internal Affairs from June 2006 to June 2014. In that capacity, Mr. Tomsheck oversaw CBP's integrity departments, including offices that investigate instances of corruption, misconduct, and the use of lethal force by CBP agents and officers. Mr. Tomsheck managed CBP's relationships with federal investigative partners such as the Federal Bureau of Investigation, the Department of Homeland Security Office of Inspector General, and the Immigration and Customs Enforcement (ICE) Office of Professional Responsibility with regard to integrity related investigations. He also

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

served as CBP's Chief Security Officer and Senior Component Accountable Official. In those roles, he oversaw the pre-employment polygraph program and managed audits of CBP that were conducted by other government agencies. Following retirement, Mr. Tomsheck also served as a subject matter expert for the Homeland Security Advisory Council, CBP Integrity Advisory Panel, discussed *infra* at 5, 19. Prior to CBP, Mr. Tomsheck was a police officer for the City of Omaha from 1974 to 1983. He served as a Special Agent for the United States Secret Service from 1983 to 2006, and was a Deputy Assistant Director of the Secret Service Office of Investigations from 2003 to 2006.

Amicus James Wong served as the Deputy Assistant Commissioner of the CBP Office of Internal Affairs from December 2008 to December 2011, assisting Mr. Tomsheck with all OIA functions discussed above. Prior to that position, he served as the Special Agent in Charge of the Dallas Field Office of the CBP OIA from December 2006 to December 2008, supervising the administrative and criminal investigations of CBP employees. He also served as the Associate Special Agent in Charge of the San Diego ICE Office of Professional Responsibility from March 2003 to December 2006, supervising the administrative and criminal investigations of ICE and CBP employees.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sergio Hernández should not have been killed. He was an unarmed teen who did not pose an imminent threat to the U.S. Border Patrol agent, Respondent Jesus Mesa, Jr., who shot him. But because of conditions within the Border Patrol, similar incidents will likely continue to occur if agents cannot be held accountable in civil suits.

Under the oversight of U.S. Customs and Border Protection (CBP), the Border Patrol is the law enforcement agency primarily responsible for detecting and preventing the illegal entry of persons across the United States' borders with Canada and Mexico. This position comes with great responsibility, as well as a vulnerability to misconduct and corruption. As security along the border has increased, criminal organizations seeking inroads into the United States have attempted to infiltrate the Border Patrol. And pre-hiring screening programs have been inadequate, leading the Border Patrol in some instances to hire actual cartel members as agents.

In addition, the Border Patrol has become increasingly militarized since 2001, with some agents comparing their role to that of the U.S. Marine Corps—even though the Border Patrol is not part of the military, and is instead a civilian law enforcement agency. Combined with inadequate field training on appropriate uses of force, these factors have led to an environment in which Border Patrol agents have unnecessarily employed lethal force on the U.S.-Mexico border.

When excessive force incidents occur, internal government investigations suffer from systemic problems. The agency with the most direct interest in the investigation—CBP—can only undertake an investigation if two other agencies decline. And agents maintain a culture of protectionism that thwarts investigations even when they are undertaken.

As for external accountability, the United States has never extradited a Border Patrol agent to stand trial in Mexico, and has itself prosecuted only one agent in a cross-border shooting. That sole prosecution was initiated three years after the incident, only after a district court refused to dismiss a civil suit against the agent responsible.

Without the possibility of civil liability, the unlikely prospect of discipline or criminal prosecution will not provide a meaningful deterrent to abuse at the border. It did not deter Respondent Mesa from shooting Petitioners' son. And it will not deter other Border Patrol agents from killing unnecessarily in future confrontations. For these reasons, *amici* respectfully support Petitioners' position that the Court reverse the judgment of the court of appeals and permit Petitioners' case to move forward.

ARGUMENT

I. The Use Of Excessive Force By Border Patrol Agents, Along With High Rates Of Corruption And Misconduct, Is A Consequence Of Increased Militarization And Inadequate Screening And Training.

A. The militarization of the Border Patrol contributes to improper use of force.

1. The United States has increasingly militarized the Border Patrol.

CBP was created in 2003 during the administrative reorganization following the attacks of September 11, 2001. Through the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002), Congress consolidated all border patrol and homeland security agencies into a new umbrella agency, the Department of Homeland Security (DHS). Within DHS, "most of the former U.S. Customs Service and the Border Patrol" merged into what is now CBP. Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel* (Mar. 15, 2016), at 1, *available at* http://tinyurl.com/CBPFinal.

CBP is the largest civilian law enforcement agency in the country, with 44,000 law enforcement officers, 21,000 of whom are assigned to the U.S. Border Patrol. *See* Homeland Security Advisory Council, *Interim Report of the CBP Integrity Advisory Panel* (June 29, 2015) (hereinafter *CBP Integrity Advisory Panel, Interim Report*), at 13, *available at* http://tinyurl.com/CBPInterim. CBP is primarily

responsible for securing the nation's borders. Within CBP, the Border Patrol's "mission is to detect and prevent the illegal entry of aliens." *See* R. Chuck Mason, *Securing America's Borders: The Role of the Military*, Congressional Research Service (Feb. 25, 2013), at 1, *available at* http://tinyurl.com/MasonSecuring.

Since 2001, the United States "has invested over $100 billion in border and immigration control." Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, Politico Magazine (Nov./Dec. 2014), *available at* http://tinyurl.com/GraffGreen. From 2001 to 2011, the Border Patrol more than doubled its workforce, from 9,200 agents to over 21,000. *See id.* CBP also invested in significant upgrades to its surveillance and defense equipment. "[I]t has become entirely normal to look up into the Arizona sky and to see Blackhawk helicopters and fixed-wing jets flying by... [and to] hear Predator B drones buzzing... [that] are equipped with the same kind of 'man-hunting' [radar] that flew over the Dashti Margo desert region in Afghanistan." Todd Miller, *War on the Border*, N.Y. Times, Aug. 17, 2013, *available at* http://tinyurl.com/MillerWar. In addition, more than one-third of Border Patrol agents are former military personnel who served in Afghanistan and Iraq. Miller, *supra*.

Border Patrol agents are also granted powers that traditional law enforcement agencies do not have. For example, within 100 miles of the border, Border Patrol agents may conduct routine searches without reasonable suspicion and without complying with

"traditional warrant and probable cause requirements." Lori Johnson, *Preserving the Excessive Force Doctrine at Our Nation's Borders*, 14 Holy Cross J.L. & Pub. Pol'y 89, 90 (2010); Miller, *supra*. Agents operating in the border zone therefore "regularly board buses and trains and ask passengers for identification." Miller, *supra*.

Many agents also consider themselves the country's first line of defense, with some likening their role to the U.S. Marine Corps and vowing to "never surrender a foot of U.S. soil." Mark Binelli, *10 Shots Across the Border*, N.Y. Times, Mar. 3, 2016 (quoting James Wong), *available at* http://tinyurl.com/Binelli. This mindset has been reinforced by high-level DHS officials. In response to criminal organizations that had been "operating with near-impunity" at the border for years, "the strategy communicated [by former Secretary of Homeland Security, Michael Chertoff] to agents out in the field[] was clear: Fight back." Graff, *supra*. As a result, the Border Patrol's "mentality is everyone they encounter is a bad guy, which is totally different from other law enforcement." *Id.* (quoting W. Ralph Basham, CBP Commissioner from 2006 to 2009).

Yet CBP is a civilian law enforcement agency, not a part of the United States military. Indeed, the military is generally prohibited from "execut[ing] the domestic laws of the United States," including immigration laws. Mason, *supra*, at 3.

2. This militarization has led to excessive uses of force.

Traditional police practices permit the use of deadly force only where it is "*required* to compel compliance from a (willing or unwilling) subject," or is otherwise reasonably necessary as a response to a risk of death or serious bodily harm. Int'l Ass'n of Chiefs of Police, *Police Use of Force in America* (2001), at 14 (emphasis added), *available at* http://tinyurl.com/PoliceUse. For example, Federal Bureau of Investigations (FBI) "special agents may use deadly force only when necessary—when the agent has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the agent or another person." Fed. Bureau of Investigation, *What is the FBI's Policy on the Use of Deadly Force by its Special Agents?*, *available at* http://tinyurl.com/FBIAbout (last visited Nov. 28, 2016).

By contrast, "[i]n wartime, the function of the military is to kill the enemy." Kurt Andrew Schlichter, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 Loy. L.A. L. Rev. 1291, 1309 (1993). Military rules of engagement provide that military personnel in combat "are under general orders not to identify themselves... and to respond to a perceived lethal threat by efficient destruction of the enemy." John Flock, *The Legality of United States Military Operations Along the United States-Mexico Border*, 5 Sw. J.L. & Trade Am. 453, 467 (1998).

The Border Patrol does not endorse the use of force protocols of military combat, and, indeed, is required to follow use of force rules that govern typical civilian law enforcement agencies. *See* 8 C.F.R. § 287.8(a). However, it does not always abide by those rules. This is most evident in response to rock throwing—a somewhat common occurrence at the border where individuals throw rocks at Border Patrol agents, sometimes to distract them from ongoing smuggling activities. *See* Binelli, *supra*.

At least through 2012, the Border Patrol had an unofficial practice of permitting Border Patrol agents to treat rock throwing as lethal force and to respond with lethal force, instead of taking cover or calling for backup. *See* Brian Bennett & Joseph Tanfani, *A Family Outing, Then a Deadly Border Patrol Shooting*, L.A. Times, Oct. 18, 2014, *available at* http://tinyurl.com/BennettTanfani. As stated by one senior DHS official, "[t]he agency has created a culture that says, 'If you throw a rock at me, you're going to get shot.'" Graff, *supra*.

DHS records show that Border Patrol agents responded to rock throwing with the use of a firearm in ten percent of cases in Fiscal Year 2011 and twelve percent of cases in Fiscal Year 2012. *See* DHS Office of Inspector General, *CBP Use of Force Training and Actions to Address Use of Force Incidents* (Redacted) (Sept. 2013) (hereinafter *DHS CBP Use of Force Training*), at 14-15, *available at* http://tinyurl.com/CBPUseOfForce. From 2010 to 2014, of the 24 cases where Border Patrol agents shot and killed individuals at the border, agents offered rock throwing as a justification for ten of them. Brian

Bennett, *Border Patrol Sees Little Reform on Agents' Use of Force*, L.A. Times, Feb. 23, 2015, *available at* http://tinyurl.com/BennettBorder.

CBP commissioned a study of these incidents in 2012. Pursuant to that directive, the Police Executive Research Forum (PERF), a nonprofit, nonpartisan research organization, reviewed 67 cases involving the use of force by CBP officers between January 2010 and October 2012. *See generally* Police Executive Research Forum, *U.S. Customs and Border Protection, Use of Force Review: Cases and Polices* (Feb. 2013), *available at* http://tinyurl.com/PERFCBPReport. PERF found that "in some cases agents put themselves in harm's way by remaining in close proximity to the rock throwers when moving out of range was a reasonable option." *Id.* at 6. In other instances, officers were safe inside their vehicles when the vehicles were hit by rocks, yet the officers still used lethal force against the rock throwers. *Id.* at 9. On the whole, PERF found that "[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force." *Id.* at 6. In some instances, "frustration is a factor motivating agents to shoot at rock throwers." *Id.* at 9. Overall, PERF concluded that "[m]oving to a safer location when possible is preferable to using deadly force and such action should be considered as part of objective reasonableness." *Id.* at 7-8.

PERF also found that Border Patrol agents used deadly force when confronting suspicious vehicles, even when there was no indication that the driver or any passenger posed a threat. *Id.* at 8. PERF deduced that, in certain cases, agents would "intentionally put

themselves into the exit path of a vehicle, thereby exposing themselves to additional risk and creating justification for the use of deadly force." *Id.*

Instead of responding to PERF's report, which CBP had commissioned, CBP "tried to prevent the scathing 21-page report from coming to light," sending House and Senate oversight committees that requested copies "only a summary that omitted the most controversial findings." *See* Brian Bennett, *Border Patrol's Use of Deadly Force Criticized in Report*, L.A. Times, Feb. 27, 2014, *available at* http://tinyurl.com/Bennett20140227. The Los Angeles Times eventually obtained a copy of the full report and CBP's internal response, which "reject[ed] the two major recommendations: barring border agents from shooting at vehicles unless its occupants are trying to kill them, and barring agents from shooting people who throw things that can't cause serious physical injury." *Id.*

Only after the Los Angeles Times obtained the report did CBP update its use of force policies. The use of force policy now provides that agents "shall not discharge their firearms in response to thrown or launched projectiles unless the officer/agent has a reasonable belief... that the subject of such force poses an imminent danger of serious physical injury or death to the officer/agent or to another person." U.S. Customs and Border Protection, Office of Training and Development, *Use of Force Policy, Guidelines and Procedures Handbook* (May 2014), at 6, *available at* http://tinyurl.com/CBPHandbook.

B. CBP's failure to adequately screen and train new hires contributes to high rates of corruption, misconduct, and excessive force.

1. Inadequate pre-employment screening permitted unsuitable candidates to join the Border Patrol.

From 2006 to 2009, CBP hired over 11,000 new agents, including nearly 8,000 into the Border Patrol. *See DHS CBP Use of Force Training*, *supra*, at 3. Because of resource constraints, however, CBP was unable to match this hiring surge with adequate pre-employment background screening and training programs. When former Secretary of Homeland Security Michael Chertoff took office, his task was to double CBP's force within four years. Graff, *supra*. But "[f]rom an integrity issue, you can't grow a law enforcement agency that quickly," observed Robert Bonner, who was the Commissioner of CBP from its inception until 2005, just before the hiring surge began. *Id.*

Moreover, as the U.S. has bolstered border security, criminal organizations have increasingly relied on bribing U.S. agents and infiltrating the Border Patrol with sympathizers in order to maintain the flow of people and contraband across the border. *See* Andrew Becker, *Border Agency Report Reveals Internal Struggles with Corruption*, Center for Investigative Reporting (Jan. 29, 2013), *available at* http://tinyurl.com/BeckerCFIR. Thus, individuals with ties to

criminal activity applied for positions with the Border Patrol. *Id.*

The FBI requires all applicants for FBI employment to take pre-employment polygraph tests. *Id.* The tests "are used to identify past behavior (e.g., use of illegal drugs, involvement with foreign nationals) that may indicate a lack of reliability in the potential employee." U.S. Dep't of Justice, Office of the Inspector General, Evaluation and Inspections Division, *Use of Polygraph Examinations in the Department of Justice* (Sept. 2006), at 26, *available at* http://tinyurl.com/DOJPolygraph.

However, despite the fact that "the border region is considered the 'highest threat environment for government corruption,'" Graff, *supra* (quoting W. Ralph Basham, CBP Commissioner from 2006 to 2009), CBP in contrast administered pre-employment polygraph examinations to only 10 to 15 percent of new hires between 2006 and 2009. *See New Border War: Corruption of U.S. Officials by Drug Cartels: Hearing Before the Ad Hoc Subcomm. on State, Local and Private Sector Preparedness and Integration of the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong., S. Hrg. 111-649 (Mar. 11, 2010) (testimony of James Tomsheck). The results of the tests that were given were staggering. Of approximately 1,000 CBP applicants subject to polygraph examinations between 2006 and 2009, almost 60 percent were determined unsuitable for service, largely because they admitted during the examination to prior criminal activity, including violent crimes and involvement with drug cartels and smugglers. *See id.*; Michael S. Danielson, *Our Values*

on the Line: Migrant Abuse and Family Separation at the Border, Jesuit Conference of Canada and the United States (Sept. 2015), at 4-5, *available at* http://tinyurl.com/DanielsonMigrant.

Yet, even with these alarming results, CBP did not begin administering polygraph tests to all new hires until October 2012. *See DHS CBP Use of Force Training, supra*, at 21. CBP thus "regularly sent new agents through the academy and even out into the field before completing full background checks." Graff, *supra.*

2. Trainings failed to compensate for inadequate screening.

The shortcomings of CBP's screening process were exacerbated by inadequate training once agents were on the job. The rapid expansion of the Border Patrol force "dilut[ed]... the level of experience of the agents in the field." Chad C. Haddal, *Border Security: The Role of the U.S. Border Patrol,* Congressional Research Service (Aug. 11, 2010), at 33, *available at* http://tinyurl.com/Haddal. By mid-2007, the average agency-wide experience level of Border Patrol agents was four to five years, but the experience level in some units along the southwest border was only 18 months. *Border Patrol, Costs and Challenges Related to Training New Agents: Hearing Before the Subcomm. On Management, Investigations, and Oversight of the H. Comm. on Homeland Security and Justice,* 110th Cong., 2007 WL 1768394 (June 19, 2007) (statement of Richard M. Stana, Director, Homeland Security and Justice, Gov't Accountability Office).

The training program for new Border Patrol agents includes three components: "(1) basic training at the academy, (2) postacademy classroom training administered by the academy but conducted in the [field offices], and (3) field training conducted on the job in the [field offices]." *Id.* A review of the training program conducted by the Government Accountability Office (GAO) in 2007 found that basic training at the academy was effective, but the "challenge" was the field offices' "capacity to provide adequate supervision and training." *Id.* Because the Border Patrol did not have a "uniform field training program" or even uniform standards that field training programs were required to follow, it was difficult for new agents to "become proficient in the safe, effective, and ethical performance of their duties." *Id.* In addition, although the agency strived for a five-to-one agent-to-supervisor ratio in the field, "as of October 2006, the overall agent-to-supervisor ratio for southwest [field offices], where the Border Patrol assigns all new agents, ranged from about 7 to 1 up to 11 to 1." *Id.*

Despite the GAO's findings almost a decade ago, training deficiencies persist, especially with regard to use of force training. In 2013, the DHS Office of Inspector General (DHS-OIG) reviewed CBP's use of force trainings and audit program. *See generally DHS CBP Use of Force Training, supra.* The review noted that CBP audit teams had identified "several major issues" with use of force field trainings. *Id.* at 17. For example, the audit of at least one location revealed that "many agents and officers do not understand use of force and the extent to which they may or may not

use force." *Id.* More generally, audits revealed that many Border Patrol teams "were not giving written tests during less-lethal force recertification training, or were not using the correct course of fire for firearms qualifications." *Id.*

DHS-OIG further observed that, although CBP's audit program helped to identify areas for improvement in field training, "there is no formal process for [follow-up], [and] no system to assess results and make appropriate timely changes to use of force training." *Id.* In other words, even where CBP was able to identify deficiencies in its use of force training programs, there was no mechanism in place to correct them.

C. The Border Patrol workforce has been plagued by corruption, misconduct, and excessive force incidents.

In light of the Border Patrol's vulnerability to influence by criminal organizations and CBP's failure to adequately screen and train agents, corruption and misconduct have been prevalent among the Border Patrol's ranks. Between 2006 and 2008, CBP hired agents who had criminal histories or, even worse, joined the Border Patrol for criminal purposes. As former Commissioner of CBP, W. Ralph Basham—who oversaw hiring between 2006 and 2008—admitted, "[w]e found out later that we did, in fact, hire cartel members." Graff, *supra*.

Specifically, CBP uncovered "dozens" of instances where criminal organizations, such as Mexican cartels and street gangs, had infiltrated its ranks. *Id.*

For example, between 2008 and 2009, a CBP officer "coordinated with smugglers to allow loads of ecstasy to go unchecked through his lane at the San Luis Port of Entry in exchange for $33,000." Brady McCombs, *Border Corruption Cases Grow*, Arizona Daily Star, Aug. 16, 2011, *available at* http://tinyurl.com/McCombsBorder. Another Border Patrol agent took bribes from drug smugglers in exchange for maps of Border Patrol sensor locations. *Id.* And yet another was caught smuggling over 700 pounds of marijuana across the border in his CBP truck. *Id.*

According to Ronald Hosko, who served as the assistant director of the FBI's criminal investigative division from 2012 to 2014, CBP officials said that as many as 10 to 20 percent of CBP's workforce "had integrity problems." Graff, *supra*. And between 2004 and 2014, "roughly 170 CBP employees, including Border Patrol agents, [were] arrested or convicted on corruption-related charges," such as smuggling, money laundering, and conspiracy. Andrew Becker, *Border Agency's Former Watchdog Says Officials Impeded His Efforts*, Washington Post, Aug. 16, 2014, *available at* http://tinyurl.com/BeckerBorder; S. Hrg. 111-649, *supra* (testimony of James Tomsheck).

Arrests for general misconduct were much greater—from 2005 to 2012, approximately 2,170 CBP officers were arrested for offenses ranging from domestic violence to drunk driving. Graff, *supra*. In one particularly shocking incident, a border patrol agent in McAllen, Texas intercepted three Honduran women—a mother and her 14-year-old daughter, and another teenage girl—as they attempted to cross the Rio Grande Valley into the United States. *See* Graff,

supra. Instead of detaining them and bringing them to a holding center, however, he kidnapped, raped, and attempted to murder them. *Id.* Although "[t]he magnitude and horror of th[is] crime were unusual,... the potential perpetrator [was not]." *Id.* Indeed, "investigating assaults and misconduct among Border Patrol agents... had become the [local FBI] field office's top criminal priority." *Id.*

Reports on the use of excessive force are also common. From 2007 to 2012, DHS identified 1,187 allegations of excessive force at the hands of CBP agents. *See DHS CBP Use of Force Training*, *supra*, at 6-7. In a survey of individuals who had been deported from July 2014 to March 2015, more than one-third reported some form of abuse or mistreatment by Border Patrol agents while in DHS custody. Danielson, *supra*, at 13-14.

II. Inefficiencies And Cover-Ups Undermine The Effectiveness Of Government Investigations Into Use Of Force Incidents.

A. Internal investigations suffer from a serious structural flaw.

Conventional federal law enforcement internal affairs models place "the internal investigative function within the agency which bears the strongest institutional interest in deterring and detecting corrupt behavior." *CBP Integrity Advisory Panel, Interim Report*, *supra*, at 10 (citation omitted). For example, within the FBI, "the FBI's Inspection Division oversees the reporting and investigative phases of the disciplinary system." U.S. Dep't of

Justice, Office of the Inspector General, Evaluation and Inspections Division, *Review of the Federal Bureau of Investigation's Disciplinary System* (May 2009), at 2, *available at* http://tinyurl.com/DOJFBIReview.

With respect to reviews of alleged misconduct by CBP personnel, however, three offices under the umbrella of DHS share competing investigative authority. Pursuant to a management directive, DHS-OIG has the right of first refusal to investigate allegations of misconduct, corruption, or excessive force within CBP. *See CBP Integrity Advisory Panel, Interim Report, supra*, at 10. If DHS-OIG declines to investigate, the Immigration and Customs Enforcement Office of Professional Responsibility (ICE-OPR) can review the case. *See DHS CBP Use of Force Training, supra*, at 6. Only if both DHS-OIG and ICE-OPR decline, may the CBP Office of Internal Affairs undertake an investigation. *Id.*

The CBP Integrity Advisory Panel, commissioned by the Secretary of DHS to review CBP's efforts to deter corruption and use of excessive force, characterized this review process as suffering from a "serious structural problem." *CBP Integrity Advisory Panel, Interim Report, supra*, at 10. CBP has the most direct access to individuals and evidence relevant to investigations of its own employees, yet it is relegated to third-tier review. Moreover, prior to August 2014, the CBP Office of Internal Affairs did not even have the authority to review cases for possible criminal misconduct—it could review only for administrative violations. *See id.* at 7.

Even in instances where the Office of Internal Affairs can investigate a case that DHS-OIG and ICE-OPR have both declined, the relationship between the Office of Internal Affairs and DHS-OIG is "broken," *id.* at 10, and "[i]nformation sharing among the offices... [i]s minimal," Binelli, *supra*. Alan Bersin, who served as CBP Commissioner from 2010 to 2011, reflected that during his tenure, "[t]here was more than tension and friction.... There was outright confrontation." Graff, *supra*. The same is true of the relationship between DHS-OIG and the FBI. The assistant director of the FBI's criminal investigative division from 2012 to 2014, Ronald Hosko, lamented DHS-OIG's practice of fighting the FBI "at every turn," and the "deliberate attempt by senior people in DHS and in the inspector general's shop to avoid cooperating with the F.B.I." Binelli, *supra*.

Moreover, when the Office of Internal Affairs has investigated incidents, it has been rebuked from within. Confronted with one such investigation, a former Chief of the Border Patrol told *amici*: "This is not what we do. We manage this problem." *See Crossing the Line*, FullMeasure (Nov. 20, 2016), *available at* http://tinyurl.com/FMCrossing. By "managing" the problem, the former Chief meant the agency should seek to bureaucratically minimize the problem, and directed *amici* to change the agency's definition of "corruption" to encompass a smaller universe of conduct that would need to be reported to DHS. *Id.*

B. Internal investigations are hampered by agents concealing their colleagues' wrongdoing.

Investigations by all offices into Border Patrol corruption, misconduct, and abuse are hampered by agents' practice of covering for one another. Known widely as the "code of silence," or "Green Code," Border Patrol agents have an understanding that they will not "say anything which may incriminate another individual member of the same force, even when this member acted in flagrant violation of the law." Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 23 Immigr. & Nat'lity L. Rev. 451, 512-13 (2002) (emphasis omitted). Richard Skinner, the first Senate-confirmed Inspector General of DHS, put it this way: "Out in the field, there was a culture to keep things to themselves. You're familiar with 'What happens in Vegas stays in Vegas?' They had a 'What happens in the field stays in the field.'" Graff, *supra*.

Former Commissioner of CBP, Alan Bersin, commissioned a study by the Homeland Security Studies and Analysis Institute in 2011, "to evaluate the agency's countercorruption programs." Becker, *Border Agency Report Reveals, supra*. The nonpublic report found that "the 'code' presents an insidious challenge to workforce integrity, and requires explicit, targeted and sustained attention." *Id.* (quoting report). In August 2012, the former Deputy Commissioner of CBP told members of Congress during a hearing on border corruption that the agency had acted on some of the study's anticorruption recommendations, "[b]ut it remains unclear to what extent

the recommendations" of the Homeland Security Studies and Analysis Institute have been adopted. *Id.*

III. Incidents Involving The Questionable Use Of Lethal Force By Border Patrol Agents Have Resulted In No Discipline.

From 2005 to February 2014, CBP officers killed at least 45 people, including 13 Americans. *See Force at the Border*, Arizona Republic, *available at* http://tinyurl.com/AZRepublicForce (last visited Dec. 5, 2016) (database of deaths by CBP officers). At least eight victims since 2010 were on the Mexican side of the border when they were shot. *See* Bennett, *Border Patrol Sees Little Reform*, *supra*. However, from at least 2007 to 2014, "[n]ot a single Border Patrol agent... [was] disciplined for excessive use of force." Graff, *supra* (quoting James Wong).

In many incidents, significant discrepancies between the agents' reports and other accounts of the events reflect attempts to cover up or justify incidents. In nine of 24 cases resulting in death between 2010 and May 2012, "agents' accounts were contradicted by other witnesses or by other law-enforcement officers." Bob Ortega & Rob O'Dell, *Deadly Border Agent Incidents Cloaked in Silence*, Arizona Republic, Dec. 16, 2013, *available at* http://tinyurl.com/OrtegaODell. In some, video footage of the shootings specifically contradicted Border Patrol agents' accounts. *Id.*

For example, in 2010, Border Patrol agents and other CBP officers beat Anastacio Hernandez-Rojas and shot him with an electric taser five times. *See*

Brian Epstein, *Crossing the Line at the Border*, Need to Know on PBS (Apr. 20, 2012), *available at* http://tinyurl.com/EpsteinCrossing. A medical examiner, labeling the death a homicide, determined that the cause of death was a heart attack resulting from a "physical altercation with law enforcement officers." *Id.*

The agents justified their use of force by claiming that Hernandez-Rojas was combative and needed to be subdued. *Id.* But video footage showed that Mr. Hernandez-Rojas was handcuffed on the ground, surrounded by a dozen officers, and calling for help when he was beaten and tased. *Id.*; *see also* Ortega, *Deadly Border Agent Incidents Cloaked in Silence*, *supra*. As the district court in the ensuing civil case noted in denying the officers' motion for summary judgment, "[d]efendants contend that Anastacio was actively resisting arrest .... However, the video evidence submitted provides, at a minimum, that Anastacio was not resisting arrest or attempting to evade arrest." *Estate of Hernandez-Rojas ex rel. Hernandez v. United States*, 62 F. Supp. 3d 1169, 1182 (S.D. Cal. 2014). Moreover, "[t]he sheer number of officers available at the scene demonstrates rather strongly that there was no objectively reasonable threat to the safety of any one [sic] other than Anastacio." *Id.* Yet the agents were never disciplined and no criminal charges were brought. *See* U.S. Dep't of Justice, Office of Public Affairs, *Federal Officials Close the Investigation into the Death of Anastasio Hernandez-Rojas* (Nov. 6, 2015), *available at* http://tinyurl.com/DOJHernandez.

That same year, Border Agent Taylor Poitevent shot Juan Mendez, an 18-year-old U.S. citizen, twice in the back. *See* Andrew Becker, *2010 Border Patrol Fatal Shooting Comes Under Renewed Scrutiny*, Reveal (Aug. 1, 2014), *available at* http://tinyurl.com/Becker2010Border. The Department of Justice initially concluded that the shooting was justified based on information that Mendez got into a physical struggle with Poitevent. *See* Becker, *2010 Border Patrol Fatal Shooting*, *supra*. However, after Poitevent made conflicting statements in a civil lawsuit involving the incident, an Assistant U.S. Attorney who had been defending Poitevent in the civil suit began digging further. Interviews revealed that Luis Valderrama, a former Border Patrol agent who had been elevated to the CBP Office of Internal Affairs, may have coached Poitevent about what to say to avoid prosecution. *Id.* Although DHS-OIG opened an investigation into Valderrama's conduct, no criminal charges or disciplinary action has been brought against Poitevent for the killing. *See id.*

In 2011, Border Patrol agents were attempting to arrest an individual who had crawled through a sewer pipe into the United States when an agent shot and killed José Alfredo Yañez Reyes, who was on the Mexican side of the border. *See* Bob Ortega, *Deadly Force Cases by Border Patrol Raising Questions*, Arizona Republic, Sept. 13, 2014, *available at* http://tinyurl.com/OrtegaDeadly. The agents claimed that Yañez had retreated into Mexico from the pipe, climbed a tree, and thrown a rock and a nail-studded board at one of them, justifying the use of lethal force. *See* Andrew Becker, *Scathing Report Deems Fatal Border Patrol Shooting 'Highly Predictable,'* Reveal

(Mar. 4, 2016), *available at* http://tinyurl.com/BeckerReveal; *see also* Binelli, *supra*. But a witness stated that Yañez was not throwing objects at the agent, but rather had threatened to take a video of the incident with his cellphone. *See id.* Tom Frazier, a former Baltimore police commissioner and former Department of Justice official who reviewed the incident in connection with a pending civil lawsuit, noted that even if Yañez had thrown objects, the agent "could and should have employed de-escalation techniques and considered the proper imminent peril standard." *Id.* Again, the agents were never disciplined and no criminal charges were brought. *See* Binelli, *supra*.

In 2012, Guillermo Arévalo Pedraza was picnicking with his family on the Mexican side of the Rio Grande River when a Border Patrol agent, who was passing in a patrol boat, shot and killed him. *See* Graff, *supra*. The agents on the boat stated that they were responding to rock throwing from the shore. *See* Ortega, *Deadly Force Cases*, *supra*. Witnesses, however, disagreed: "Pedraza was not throwing rocks, but [was] one of several people shouting at the agents not to drown a man swimming in the river." *Id.* Video footage of the incident shows the Border Patrol boat speeding away from the scene immediately after the shooting, strongly suggesting that—even if the agents had been subjected to rock throwing—they could have sped out of throwing distance instead of shooting Pedraza. *See* Graff, *supra* (linking to a YouTube video of the incident at http://tinyurl.com/YTPedraza). Again, the incident resulted in no discipline and no criminal charges. *See* Binelli, *supra*.

Also in 2012, Border Patrol agent Lonnie Ray Swartz fatally shot 16-year-old José Antonio Elena Rodríguez 10 times in the back while he was walking along a main thoroughfare on the Mexican side of the border. *See* Binelli, *supra*. Swartz "claimed he was acting in self-defense when confronted by rock throwers on the other side of the border." Richard Gonzales, *Federal Appeals Court Considers Border Shooting Case*, NPR (Oct. 21, 2016), *available at* http://tinyurl.com/GonzalesNPR. Initial reports also stated that at least one rock had hit and injured a police dog. *Cf.* Binelli, *supra*.

But further inquiry contradicted these accounts. Although CBP has not publicly released surveillance videos of the shooting, James Tomsheck has viewed the footage, which "demonstrated that José Antonio was certainly not throwing rocks at the time he was shot." *Id.*; *see also* Becker, *Scathing Report, supra*. Instead, the footage shows two people—neither of whom are José Antonio—attempting to scale a fence and two police officers and a Border Patrol agent observing them, when Swartz arrives on the scene, "walks to the fence, pulls out his gun and begins firing." Binelli, *supra*. José Antonio "collapsed on a sidewalk" nearby. *Id.*

No disciplinary action was brought against Swartz. However, Rodríguez's family instituted civil litigation. The district court found that Swartz was not entitled to qualified immunity where the complaint alleged that Rodríguez "was not committing a crime[,]... throwing rocks," hiding, "using a weapon, or in any way threatening U.S. Border Patrol agents or anyone else," immediately before the shooting, and

where observers stated that Rodríguez "did not pose a threat, but was peacefully walking down the street." *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1036 (D. Ariz. 2015). Two months after the district court's decision, and almost three years after Rodríguez's death, the Department of Justice brought criminal charges against Swartz. *See* Binelli, *supra*. The case remains pending.

Finally, in the instant case, Respondent Mesa shot and killed Petitioners' 15-year-old son, Sergio. The FBI initially reported that agents were responding to a group of smugglers near a port of entry and that, after the agents had detained two of the individuals, others began to throw rocks. *See* Fed. Bureau of Investigation, *Assault on Federal Officer Investigated* (June 8, 2010), *available at* http://tinyurl.com/FBIAssault. According to the FBI, after Mesa "gave verbal commands to the remaining subjects to stop and retreat[,]... the subjects surrounded [Mesa] and continued to throw rocks at him," at which time Mesa fired, killing Sergio. *Id.*

However, video footage of the incident appears to tell a different story. "In one video, some youths can clearly be seen making throwing motions. But [Sergio] isn't among them. He's visible, peeping out from behind a pillar beneath a train trestle. He sticks his head out; Mesa fires; and the boy falls to the ground, dead." Ortega, *Deadly Border Agent Incidents Cloaked in Silence*, *supra*. Other videos "appear to show that [Sergio had been] trying to run and hide" before he was shot. Adam Liptak, *An Agent Shot a Boy Across the U.S. Border. Can His Parents Sue?*, N.Y. Times, Oct. 17, 2016, *available at*

http://tinyurl.com/LiptakAgent; *see also* Graff, *supra* (linking to a YouTube video of the incident at https://www.youtube.com/watch?v=7wI2Q1XikLw). Notably, the final Department of Justice report does not state that Respondent Mesa was "surrounded" by rock throwers or that Sergio was throwing rocks. *See* U.S. Dep't of Justice, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca* (Apr. 27, 2012) (hereinafter *DOJ Hernandez Press Release*), *available at* http://tinyurl.com/DOJHernandezPR. Nevertheless, no disciplinary action was brought, and DOJ closed the case without pressing charges, concluding that "the agent did not act inconsistently with CBP policy or training regarding use of force." *Id.*

In addition to the lack of accountability for these killings, reports of other forms of abuse likewise rarely result in discipline. Out of 809 complaints alleging abuse from January 2009 to January 2012, 97 percent of the cases that reached a formal decision resulted in "No Action Taken." Daniel E. Martínez, Guillermo Cantor, & Walter A. Ewing, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, American Immigration Council (May 2014), at 1, *available at* http://tinyurl.com/MartinezNoAction. Of the 67 cases reviewed in the PERF study that found that officers routinely used excessive force in response to rock-throwing, no charges were brought as a result of CBP's internal review, although two agents "received oral reprimands." Brian Bennett, *Border Patrol Absolves Itself in Dozens of Cases of Lethal Force*, L.A. Times, June 15, 2015, *available at* http://tinyurl.com/Bennett20150615. Three cases remain "within the

purview of the Department of Justice's Civil Rights Division." Bob Ortega, *CBP: No Action Against Border Agents in Deadly-Force Cases*, Arizona Republic, June 8, 2015, *available at* http://tinyurl.com/OrtegaNoAction; *see also* Bennett, *Border Patrol Absolves Itself*, *supra*.

IV. Board Patrol Agents Who Use Illegal Force Will Not Be Held Accountable Unless Suits Like Petitioners' Are Allowed To Proceed.

If victims and their families are unable to hold Border Patrol agents accountable for using excessive force, agents who employ such force can continue to abuse and kill individuals at the border with impunity. The United States raises the possibility of criminal proceedings in the United States or Mexico, *see* U.S. Opp. 8, but, as the government acknowledges, it refused to extradite Respondent Mesa for prosecution in this case. Pursuant to the applicable extradition treaty, the United States has no obligation to extradite its own citizens, and it is "inconceivable" that the United States would choose to extradite a government official who it concluded acted "in good-faith execution of his duties." Adriana M. Chavez, *Experts Say Extradition Unlikely If Agent Charged*, El Paso Times, June 22, 2010, 2010 WLNR 12633548 (quoting Allen Weiner, Director, Stanford Program in International and Comparative Law); *see DOJ Hernandez Press Release*, *supra*. Indeed, the United States does not point to a single instance, and *amici* have found none, in which it extradited a CBP agent to Mexico for prosecution. The theoretical possibility of extradition to Mexico thus provides no meaningful deterrent to excessive use of force.

Similarly, the threat of prosecution in the United States appears minimal. The failings of the internal investigation process reveal that the system is skewed to avoid discipline and prosecution. Even in the only cross-border-shooting case that resulted in prosecution, the case of 16-year-old José Antonio Elena Rodríguez, the Department of Justice took three years to obtain an indictment and did so only after significant media coverage and a civil suit. *See* Rob O'Dell, *Experts: Pressure from Advocates, Press Led to Murder Charges Against Border Patrol Agent in Teen's Death*, Arizona Republic, Sept. 28, 2015, *available at* http://tinyurl.com/ODellExperts.

Against this backdrop, the prospect of civil liability plays a proper and important role in deterring Border Patrol officers from using excessive force in confrontations with individuals at and across the border. In many instances, civil suits also expose improper use of force where internal investigations failed. For example, the civil suit in Juan Mendez's case exposed the inconsistences in Agent Poitevent's statements that led to the discovery of possible CBP coaching. *See* Becker, *2010 Border Patrol Fatal Shooting*, *supra*. In José Alfredo Yañez Reyes's civil case, a law enforcement expert highlighted the agent's improper use of force. *See* Binelli, *supra*. And it may have been the district court's refusal to dismiss the civil suit in the Rodríguez case on qualified immunity grounds that finally convinced the Department of Justice to bring criminal charges two months later, almost three years after the underlying incident. *Id.*

"[P]ermitting noncitizens to bring claims of excessive deadly force... reduces the threat, to citizens and

foreigners alike, that executive agents will 'switch the Constitution on or off at will' by exporting violence...." Eva L. Bitran, *Boumediene at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 Harv. C.R.-C.L. L. Rev. 229, 249-50 (2014) (quoting *Boumediene v. Bush*, 553 U.S. 723, 765 (2008)). Claims like Petitioners' should be allowed to proceed.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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